REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

COMMERCIAL & TAX DIVISION

MISC APPLICATION 303 OF 2018

OLUOCH- OLUNYA & ASSOCIATES ADVOCATES.....ADVOCATE/RESPONDENT

- VERSUS -

PARKLANE CONSTRUCTION LTD.....RESPONDENT/APPLICANT

RULING

REFERENCE

The Advocate for Respondent/Applicant filed reference based on **Sections 1A 1B & 3A CPA & Rule 11(2) Advocates Remuneration Order** from the Ruling on Taxation of Advocate's Bill of Costs by Taxing Officer Hon H.O Opande (DR) delivered on 24th January 2019.

1. The Applicant's Advocate sought that the Court vacates and/or sets aside the entire Ruling and Reasoning of Bill of Costs dated 7th July 2018 at Ksh 1,654,747.27/= .

2. The Applicant's Advocate sought reassessment of quantum of total fees and VAT chargeable in the Bill of Costs.

3. The Advocate sought in the alternative the Bill of Costs to be remitted for reassessment of quantum of total fees and VAT chargeable before a different Taxing Officer.

The Applicant relied on the following grounds;

1) The Taxing Officer acted contrary to settled legal principles, the decision was erroneous and unreasonable in the circumstances. The Advocate/Client fees of Ksh 1,654,747.27/=was/is disproportionate and excessive.

2) The requisite instruction fee was agreed and part payments made culminating to the final fee note of Ksh 280,000/- that was outstanding. The total amount agreed on was Ksh 1,044,000/= which finally and fully settled.

3) The Applicant contended that even after settlement of the agreed Legal fees of Ksh 1,044,000/= by payment of the outstanding amount Ksh 280,000/= on 2nd July 2018, the Taxing Officer's taxation of Ksh 1,654,747.27/= was arbitrary, capricious and unjustified and violated the principle that costs should not be awarded.

4) The Applicant submitted that the Taxing Officer failed to consider their submissions to enable him exercise discretion and arrive at fair and just conclusion.

5) The Taxation of Bill of Costs filed on 7th June 2018 caused prejudice, irreparable and substantial loss to the Applicant.

The Respondent in Reply relied on the Replying Affidavit filed on 10th May 2019, contended that it is not disputed that in December 2017 that the Advocate/Respondent received instructions from Respondent/Applicant and G3 Systems Kenya Ltd in a dispute over provision of Design & Build Services of Technical & Domestic Accommodation in Laikipia Air Base (East) Kenya and sought an award of Ksh 305,914,549.89/-.

The Respondent submitted that the Advocate obtained instructions and prepared pleadings/documents then instituted the Arbitration proceedings. Thereafter, the parties through advocates engaged in negotiations resulting in Settlement Agreement of Ksh 60,404,249.22/-. Thereafter, the Advocate/Respondent obtained instructions to file proceedings in the High Court.

It was/is not in dispute that the Advocate/Respondent and Applicant/Respondent held discussions and agreed that the Advocate would receive Ksh 1,044,000/- as legal fees as professional services rendered on condition the same was paid within 7 days 27th April 2018 as shown by annexed and marked ''**LAO1**''letter of 20th April 2018. The Applicant/Respondent failed to settle the same despite demand and notices annexed and marked ''**LAO2**''letters and copies of demand and reminders. The final amount was settled on 2nd July 2018 after taxation proceedings commenced.

The Advocate/Respondent submitted that the Taxing Officer's taxation was arrived at without any error and in line with applicable law; the Bill of Costs was drawn to scale as stipulated in the Advocates Remuneration Act taking into account all relevant circumstances as the law requires.

The Instruction Fees of Ksh 944,404.18 was pegged to the value of the dispute as settled by the parties Ksh 60,404,249.22 as value of subject matter and not the claim of Ksh 305,914,549.89/-

The Taxing Officer taxed the Bill of Costs at Ksh 1,654,747.27/= and also took into account the amounts already paid by the Respondent/Applicant Ksh 1,015,000/= leaving a balance of Ksh 859,329.83/- in the certificate of Taxation.

APPLICANTS' SUBMISSIONS

1. The Applicant/Respondent submitted that an agreement should be inferred from the series of correspondence dated 10th April & 20th April 2018 which shows that parties agreed on fees on the 2 matters; the Arbitration proceedings that culminated to a settlement and the Miscellaneous Application filed in the High Court related to the settlement. The Advocate/Respondent relied on the Agreement and sought the final balance of the retainer which was paid by the Client.

2. The Applicant relied on the case of ***Kakuta Maimai Hamise Vs Peris Pesi Tobiko, IEBC & Returning Officer ; Kajiado East Constituency [2017] klr*** which reads in part as follows;

> ***"….Whereas an agreement may be formed by a series of correspondences, the client has not exhibited any document by which he signalled his acceptance of the proposed fees by the advocate..."***

3. The Applicant submitted that there was a valid fee agreement owing to the fact that there was an offer of the proposed fees by the Advocate, acceptance by the client (Respondent/Applicant) and there was consideration by the Advocate by getting the work done in both matters.

4. In reliance to the above –mentioned case; ***Kakuta Maimai Hamise supra***, the Applicant cited in part;

> ***"In this case the documents relied upon, I am afraid do not meet the threshold for a validly binding agreement so as to bar the advocate from taxing his costs more so there is no evidence that the client accepted the proposal by the advocate even if it were to be found that the letter of 20th June,2013 was a proposal of final fee. An agreement must contain both an offer and acceptance and where one condition is not satisfied there is no binding agreement."***

RESPONDENTS' SUBMISSIONS

1. The Respondent submitted that the law on retainer agreements is embodied under **Section 45 (1) of the Advocates Act** that provides for a valid and binding fee agreement to be in writing and signed by the client and/or his authorised agent.

2. The retainer and retainer agreement are defined in the Court of Appeal decision of ***Omulele & Tollo Advocates Vs Mount Holdings [2016] eKLR***

3. The Respondent submitted that laws and principles of taxation in taxing the Bill of Costs guided Taxing Officer. In reliance of **Section 44 of the Advocates Act**, the Taxing Master taxed off Ksh 6,530,922.50 and taxed the Bill at Ksh 1,654,747.27/-

4. The Taxing Officer relied on the value of subject-matter at Ksh 60,404,249.22 and not at Ksh 305,914,549.89/-.

DETERMINATION

After considering the pleadings and submissions by parties the issue (s) for determination is whether the reference to vacate and/or set aside the Ruling by Taxing Officer of 24th January 2019 is granted or dismissed.

The Applicant raised various grounds in aid to their submission as follows;

> 1) The Taxing Officer acted contrary to settled legal principles, the decision was erroneous and unreasonable in the circumstances. The Advocate/Client fees of Ksh 1,654,747.27/= was/is disproportionate and excessive.

The Taxing Officer outlined in full **Section 45 of the Advocates Act particularly;**

45. Agreements with respect to remuneration

(1) ***Subject to section 46 and whether or not an order is in force undersection 44, an advocate and his client may—***

(a) before, after or in the course of any contentious business [Civil or Criminal Court] make an agreement fixing the amount of the advocate's remuneration in respect thereof;

(b) …..

(c) ……

and such agreement shall be valid and binding on the parties provided it is in writing and signed by the client or his agent duly authorized in that behalf."

The Taxing master applied the legal principle therein on the facts of the Bill of Costs proceedings and found as follows;

"It therefore behoves upon the Respondent to provide proof of an agreement or provide documents or communication in which such offer was made and accepted to help this Court consider if the same can be construed as an agreement. In the absence of such evidence the averments by the Respondent remain just that. It is important that I mention that all the authorities cited by Respondent only support the argument on lack of jurisdiction to tax where there is an agreement. However, in this case there is no evidence of an agreement and more so a written agreement."

In the case of; Omulele & Tollo Advocates Vs Mount Holdings Ltd C.A.75 of 2015 it was held***;***

"A retainer means the instruction, employment or engagement of an advocate by his client.

On the other hand, a retainer agreement is merely a contract in writing prescribing the terms of engagement of an advocate by his client, including fees payable. Therefore, it is submitted while a retainer denotes a relationship between parties, the retainer agreement is merely the physical written document or manifestation of such a relationship……

As the Section [45 of Advocates Act] indicates, under such agreement, the parties fix or put a cap on the advocates' instruction fees….both parties are beholden to the amount so fixed. From the foregoing it should thus be clear that the presence of a retainer is what in turn gives rise to the retainer Agreement…..It follows that for the retainer agreement to be valid and binding, the same must have been put in writing and signed by client and /or his agent. It is erroneous as submitted by Counsel for the Respondent that retainer and retainer agreement mean one and the same thing."

The Taxing Officer found based on the law, that the Respondent now Applicant failed to provide and documents/letters/agreement that was/were in writing and that the professional/Legal fees were an agreed figure and that the Agreement was signed by the Client and/or authorised agent.

The Taxing Master found that there was a retainer between the Applicant and Respondent but it was not reduced in writing and signed by client or authorised agent and therefore the letters did not amount to the Retainer Agreement. **Section 45 Advocates Act** is couched in mandatory terms that it leaves no room for the Court and/or parties to infer an agreement in the absence of such an agreement between advocate and client. Therefore, the Taxing Officer was legally bound to tax the Bill of Costs.

2) The Applicant contended that even after settlement of the agreed Legal fees of Ksh 1,044,000/= by payment of the outstanding amount Ksh 280,000/= on 2nd July 2018, the Taxing Officer's taxation of Ksh 1,654,747.27/= was arbitrary, capricious, unjustified and violated the principle that costs should not be awarded.

The requisite instruction fee was agreed and part payments made culminating to the final fee note of Ksh 280,000/- that was outstanding. The total amount agreed on was Ksh 1,044,000/= which finally and fully settled. The decision was erroneous and unreasonable and the Advocates Fees are grossly exaggerated, excessive and gratuitous and without basis in law and fact.

With regard to the retainer of the Respondent by the Applicant in both proceedings that fact was not contested, the services rendered by the Respondent in both Arbitration and High Court proceedings were not contested, except that the 2 distinct cases related to similar parties and subject-matter.

The Instruction Fees were obtained from **Schedule 6 of Advocates Remuneration Rules: Costs of Proceedings in the High Court Party to Party Costs** where **Section 1 (a) (b) & (c)** provide;

"Instruction fees

Subject as hereinafter provided, the fees for instructions shall be as follows—

(a) To sue in an ordinary suit in which no appearances is entered under Order IXA of the Civil Procedure Rules where no application for leave to appear and defend is made, the fee shall be 65% of the fees chargeable under item 1(a).

(b) To sue or defend in a suit in which the suit is determined in a summary manner in any manner whatsoever without going to full trial the fee shall be 75% of the fees chargeable under item 1(b).

> ***(c) In a suit where settlement is reached prior to confirmation of the first hearing date of the suit the fee shall be 85% of the fee chargeable under item 1(b) of this Schedule."***

The Taxing Officer in applying the Schedule 6 stated as follows;

> ***"In as much as I would agree that instructions on arbitration proceedings and the Suit in the high Court are two distinct set of instructions and therefore the Applicant is entitled to fees of each set of instructions, there is no way we can divorce the Settlement in HCCC 1 of 2018 from the one alleged to in the letter supporting the Bill."***

The Taxing Officer set aside the proposed claim in the subject-matter of Ksh 305,914,549.89/- and applied **Schedule 6 1 (c)** to the settlement figure of Ksh 60, 404,249.22/= ; 85% of Ksh 1,111,063.70 which was the amount chargeable on the subject-matter at Ksh 994,404.18 as instruction fees. The rest of the items were unopposed. The Taxing Master in applying the law reduced the bill of Costs of Ksh 8,185,669.77 to the now contested figure of Ksh 1,654,747.27/=.

In the case of ***Joreth Ltd Vs Kigano & Associates Civil Appeal No 66 OF 1999,*** the Court of Appeal stated of Instruction fees;

> ***"We would like at this stage [to] point out that the value of the subject matter of a suit for purposes of taxation of the Bill of Costs ought to be determined from the pleadings, judgment of settlement (if such be the case) but if the same is not so ascertainable, the Taxing Officer is entitled to use his discretion to assess such instruction fee as he considers just, taking into account, amongst other matters, nature and importance of the cause or the matter, the interest of the parties, general conduct of the proceedings, any discretion by the Trial Judge and all other relevant circumstances."***

From the above considerations of the Taxing Officer's analysis and application of the relevant legal principles to circumstances of this case, I find nothing in the taxation Ruling to demonstrate that the Taxing Officer did not take into account the relevant legal principles.

With regard to the Applicant's allegation that the Taxing Officer's decision was arbitrary, capricious, unjustified and the Advocates Fees are grossly exaggerated, excessive and gratuitous and without basis in law and fact; this Court relied on the case of ***Republic Vs Ministry Of Agriculture & 2 Others Exparte Muchiri W'njuguna & 6 Others [2006] eKLR, OJUANG J (as he then was) stated;***

> ***"The taxation of costs is not a mathematical exercise; it is entirely a matter of opinion based on experience. A Court will not therefore interfere with the award of Taxing Officer, merely because it thinks the award somewhat too high or too low; it will only interfere if it thinks the award is too high or too low as to amount to an injustice to one party or the other…The Court cannot interfere with the Taxing Officer's decision on taxation unless it is shown that either the decision was based on error of principle, or the fee awarded was manifestly excessive as to justify an interference that it was based on an error of principle."***

The Taxing Officer considered the Bill of Costs of Arbitration Proceedings; the parties forum of choice instead of the High Court under **Schedule 6 of Advocates Remuneration Rules** in the absence of a Retainer Agreement between the parties.

The Taxing Officer taxed off almost Ksh 6,530,922.05/- from the Bill of Costs of Ksh Ksh 8,185,669.77. The Applicant did not contest that they gave the Respondent a retainer to institute and represent the Applicant in the Arbitration proceedings. The Respondent rendered Professional legal services in preparation of pleadings, perusal of documents and correspondence, legal advice to client, research on laws especially with regard to the foreign Company involved and negotiation skills to arrive to an amicable settlement with the other party. In the Court's view the taxed Bill of Ksh 1,654,747.27/= was/is reasonable in the circumstances. The amount is not excessive or arbitrary as the Taxing Officer employed the reasons and basis for taxation and relied on legal principles.

The Applicant submitted that the Taxing Officer failed to consider their submissions to enable him exercise discretion and arrive at fair and just conclusion. From the Taxing Officer's Ruling of 24th January, 2019, the Applicant's and Respondent's submissions are acknowledged and summarized on page 1 & 2 the pertinent issue for determination; was there an agreement or not between the parties?

DISPOSITION

1. The Reference filed on 11th March 2019 to vacate/set aside the Taxing Officer's Ruling of 24th January 2019 is dismissed with costs.

2. The Taxing Officer's Ruling of 24th January 2019 is upheld.

3. Any legal fees already paid to the Respondent/Advocate by Applicant with regard to the subject matter shall be acknowledged and deducted from the Certificate of Taxation and not be subject to Costs.

4. Any execution shall be held in abeyance during the Corona Virus Pandemic lockdown until the Government announces resumption to normalcy.

DELIVERED SIGNED & DATED IN OPEN COURT ON 28TH APRIL 2020.

M.W.MUIGAI

JUDGE

IN THE PRESENCE OF;

CM ADVOCATES FOR APPLICANT

OLUOCH-OLUNYA FOR RESPONDENT