



REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI-MILIMANI

COMMERCIAL & ADMIRALTY DIVISION

MISC. CIVIL APPLICATION NO. E268 OF 2019

IN THE MATTER OF THE ADVOCATES ACT CAP 16

AND

IN THE MATTER OF THE ADVOCATE-CLIENT BILL OF COSTS

AND

IN THE MATTER OF NBI HC COMM NO. 83 OF 2019, VICTORIA

COMMERCIAL BANK LIMITED v MALPLAST INDUSTRIES LIMITED

EDDY NICHOLAS O ORINDA P/A

ONE AND ASSOCIATES ADVOCATES.....APPLICANT/ ADVOCATE

VS

VICTORIA COMMERCIAL BANK LIMITED.....RESPONDENT/ CLIENT

RULING

1. Before this court for determination are two applications, namely; the client's reference dated 18th November 2019 and the advocate's application dated 13th November 2019. The reference is brought under Rule 11 of the Advocates Remuneration Order, the Advocates Act.

2. The client seeks the following orders;

a. THAT the ruling and the order on taxation delivered herein on 6th November 2019 be varied and/or set aside

b. THAT this honourable court be pleased to tax the bill of costs dated 27th June 2019 afresh and/or make directions as to fresh taxation before a different taxing master

c. THAT costs of this reference be provided for

3. The application is supported by the affidavit of RUTH MUASYA who states that the Taxing Master misconstrued the subject matter completed the taxation on the wrong premises. She avers that the Taxing Master erred in equating a statutory notice under the Land Act to a demand before arriving at the finding that the subject matter was Kshs 729,340,404. She faults the Taxing Master for failing to apply the Provisions of Paragraph 7(a) which provides for a minimum of kshs 1000 for instruction fees in instances where not more than one letter is written. She further states that the award taxation was manifestly excessive and the finding erroneous.

4. The advocate's application is brought pursuant to section 51 of the Advocates Act and seeks the following orders;

a. That judgment and decree be hereby entered and issued on behalf of the applicant against the respondent for Kshs 5,839,266/= on account of taxed advocate-client legal costs.

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

5. The application is supported by an affidavit of **EDDY NICHOLAS ORINDA**. The advocate argued that the client's assertion that the security documents had not been perfected was misleading as the only security was for a debt of 150,000 million. According to the advocate, the debt of Kshs. 323,736,397 remained unsecured and it is for the unsecured debt that he was retained.

6. On its part, the client maintained that the advocate misled the Taxing Master when he stated that he was instructed to perfect charge and or further charge over the property known as LR NO 2327/330 NAIROBI. It was submitted the Taxing Master erred in principle by not appreciating the fact that the letter authored by the advocate did not contain the amount demanded. The client argued that the Taxing Master erred in principle in adopting the value of the charges and credit facility letter that were not prepared by the advocate as the subject matter.

Issues

7. Whether the taxing officer erred in law and principle in the taxation of the bill of costs dated 6th November 2019

8. Whether judgment should be entered and issued on behalf of the applicant/advocate against the respondent/client

Analysis

9. I have carefully considered the pleadings filed herein, the submissions by Counsel and the authorities that they relied on.

10. This court has been called upon to determine whether, in taxing the bill of costs dated 6th November 2019, the Taxing Master made an error that warrants this court's interference with the said taxation. The client's contest is in respect to item 1 of the bill of costs which is the instruction fees. According to the client, the letter that the Taxing Master relied upon in ascertaining the instruction fees did not contain the amount of money that was the subject of the demand. It was the client's contention that the Taxing Master misapprehended the meaning of securing a debt and a demand. According to the client, the award of instruction fees of Kshs 5,000,00 was manifestly excessive.

11. In a rejoinder, the advocate maintained that the debt that remained unsecured was Kshs 323,736,397 which the advocate had been retained to secure. The Taxing Master held as follows in regard to instruction fees:

"...it is clear from the above that the respondent was apprehensive about the possibility of losing Kshs 323,736,397/= loaned out to ADM Consulting Limited and for as far as the securities had not been stamped and registered, the debt was unsecured. Although not clearly written, the applicant has exhibited enough material before court to show that he had instructions from the respondent to secure a debt of Kshs. 323,736,397 which it had loaned to its customer, and pursuant to paragraph 1 of part 11 Schedule V, and having regard to the nature and the value of the subject matter involved (which matter would ordinarily attract instruction fees over Kshs 5,000,000/=) I find a sum of Kshs 5,000,000/= sufficient to cover the item on instruction fees. A sum of Kshs 27,000,000/= is therefore taxed off from item No 1."

12. In *Joreth Ltd v Kigano & Associates (2002)1 EA 92* the court of appeal held that;

"the value of the subject matter for purposes of taxation of a bill of costs ought to be determined from the pleadings, judgment or settlement (if such be the case) but if the same is not ascertainable the taxing officer is entitled to use his discretion to assess such instruction fees as he considers just taking in account, amongst other matters, the nature and the importance of the cause or matter, the interest of the parties, the general conduct of the proceedings ,any direction by the trial judge and all other relevant circumstances."

13. In this case the issue is whether the client instructed the applicant to secure the debt of Kshs 323,736,397/- for that unsecured amount and to ensure the debtor did not leave the Courts jurisdiction. I have perused the documents on record and noted that it is not in dispute that there were instructions from the client to the advocate to act on its behalf. What is dispute however is the nature of instructions as while on one hand the client states that the instructions were to write a demand letter, the advocate on the other hand avers that the instructions were to secure a debt.

14. In taxing the bill, the Taxing Master relied on Part 1 of Part II of schedule V the Advocates Remuneration Order and found that the sum of Kshs 5,000,000 was sufficient to cover the item on instruction fees. From the foregoing it is evident that there was an advocate/client relationship between the parties in which the advocate was mandated to work on the demand for the compliance of the client's debtor ADM Consulting Limited. I am therefore convinced that the services offered by the advocate were more than drafting a demand as enunciated by the client. A closer look at the correspondences between the advocate and the legal representative of the client found on page 174 on the bundle of document reveals that the advocate was involved in the debt collection process

15. On whether the awarded given was manifestly excessive, this court is guided by the case of *Republic v Ministry of Agriculture & 2 others Ex parte Muchiri W'njuguna & 6 Others [2006] eKLR* Ojwang, J (as he then was) expressed himself *inter alia* as follows:

"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 a taxing officer, particularly where he is an officer of great experience, merely because it thinks the award somewhat too high or too low; it will only interfere if it thinks the award so high or so 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 an error of principle, or the fee awarded was manifestly excessive as to justify an interference that it was based on an error of principle."

16. The client contends that the instruction fee awarded at a sum of Kshs 5,000,000 is too high and amounts to an error of principle. I note

that in the fee note raised by the advocate on 6th May 2019 the instruction fee requested was Kshs 5,616,000. I find that the fee awarded by the taxing officer was appropriate.

17. The court is also cognizant of the general rule that it should not interfere with the Taxing Master's award on taxation except in exceptional circumstances where there is an error in principle. This is the position that was adopted in **KANU National Elections Board & 2 others v Salah Yakub Farah** [2018] eKLR wherein it was held that:

“The general principles governing interference with the exercise of the taxing master’s discretion were authoritatively stated by the South African court in the case of Visser vs Gubb 1981 (3) SA 753 (C) 754H – 755C as follows:-

“The court will not interfere with the exercise of such discretion unless it appears that the taxing master has not exercised his discretion judicially and has exercised it improperly, for example, by disregarding factors which he should properly have considered, or considering matters which it was improper for him to have considered; or he had failed to bring his mind to bear on the question in issue; or he has acted on a wrong principle. The court will also interfere where it is of the opinion that the taxing master was clearly wrong but will only do so if it is in the same position as, or a better position than, the taxing master to determine the point in issue . . . The court must be of the view that the taxing master was clearly wrong, i.e. its conviction on a review that he was wrong must be considerably more pronounced than would have sufficed had there been an ordinary right of appeal.”

18. In conclusion and guided by the above cited authority, I find that the client has not satisfactorily demonstrated that the taxing master erred in principle to warrant this court's interference with the award. I therefore do not find merit in the reference and hereby dismiss it with costs.

19. Having dismissed the reference, I find that the second application by the advocate therefore succeeds. Section 51(2) of the Advocates Act grants this court the mandate to enter judgment for the costs recovered. It provides that;

“The certificate of the taxing officer by whom any bill has been taxed shall unless it is set aside or altered by the court, be final as to the amount of the costs recovered thereby; and the court may make such order in relation thereto as it thinks fit, including where the retainer is not disputed, an order that judgment be entered for the sum certified to be due with costs.”

20. In **Lubulellah & Associates Advocates v N K Brothers Limited** [2014] eKLR the court observed that:

“The law is very clear that once a taxing master has taxed the costs, issued a Certificate of costs and there is no reference against his ruling or there has been a ruling and a determination made and not set aside and/or altered, no other action would be required from the court save to enter judgment. An applicant is not required to file suit for the recovery of costs. The certificate of costs is final as to the amounts of the costs and the court would be quite in order to enter judgment in favour of the Applicant against the Respondent herein for the taxed sum indicated in the Certificate of Taxation that was issued on 25th November 2012.”

21. Given that certificate of taxation dated 13th November 2019 has not been set aside or impugned by this court, I hereby enter judgment in favour of the advocate/ applicant against the respondent/client for a sum of Kenya shillings Five million, Eight Hundred and Thirty-nine thousand and Two hundred and Sixty-Six (5,839,266/=)

22. The applicant is further awarded costs plus interest from the day of the judgment pursuant to Rule 7 of the Advocates (Remuneration) order. The said Rule provides:

“An advocate may charge interest at 14% per annum on his disbursements and costs, whether by scale or otherwise, from the expiry to one month from the delivery of his bill to the client, providing such claim for interest is raised before the amount has been paid or tendered in full.”

Dated, signed and delivered via Microsoft Teams at Nairobi this 20th day of August 2020 in view of the declaration of measures restricting court operations due to Covid -19 pandemic and in light of the directions issued by his Lordship, the Chief Justice on the 17th April 2020.

W. A. OKWANY

JUDGE

In the presence of:

Mr. Omwago for advocate.

Mr. Makori for client.

Court Assistant: Sylvia