



REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI-MILIMANI

COMMERCIAL & ADMIRALTY DIVISION

MISC. CIVIL APPLICATION NO. E264 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. This ruling is in respect to two applications, namely; the client/ applicant's reference dated 18th November 2019 and the applicant/ advocate's application is dated 13th November 2019. Parties agreed to canvass the two applications together.

2. The client's reference is brought under Rule 11 of the Advocates Remuneration order and 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 thereby starting and completing the taxation on the wrong premises. She further states that there was an error in equating a statutory notice under the Land Act to a demand letter thus making the subject matter to be Kshs 729,340,404. She faults the taxing master for failing to apply the Provisions of Paragraph 7(a) which gives a minimum of Kshs. 1000 in instances where not more than one letter is written. It is client's case that the taxation award was manifestly excessive and the finding erroneous.

4. The advocate's application, on the other hand, is brought pursuant to Section 51 of the Advocates Act is supported by the affidavit of **EDDY NICHOLAS ORINDA** and seeks the following orders;

a. THAT judgment and decree be and is hereby entered and issued on behalf of the applicant against the respondent for Kshs. 12,835,789.83/= 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 applications were canvassed by way of written submissions. The advocate submitted that the Taxing Master did not equate a statutory notice to a normal demand letter. According to the advocate, the claim that the one off payment of US Dollars 11,295 to the advocate which was to be deducted in Application No. 265 of 2019 was misconceived because the Taxing Master found that the credit note had already been deducted. It was submitted that the client failed to demonstrate that the Taxing Master had exercised her discretion improperly by failing to consider relevant issues therefore coming up with a finding that is manifestly excessive.

6. Counsel for the client submitted that the notice that was issued by the advocate was meant to set the chargee's power of sale in motion and was not a demand for the outstanding amount. The client faulted the Taxing Master for failing to consider the submissions by the client to the effect that the instructions to the advocate were for issuance of a statutory notice and that the bill of costs ought to have been taxed under schedule 5 part II paragraph I of the Remuneration Order. The client argued that assuming the instructions given to the advocate were for debt recovery, the taxing master erred by failing to apply the provisions of paragraph 7 of schedule 5 of the advocates remuneration order.

7. It was further submitted that the Taxing Master erred in principle by failing to set out the basic instruction fees. Reference was made to the decision in *Nyangito & Company Advocates v Doinyo Lessos Cremaries Ltd* [2014] eKLR.

8. I have carefully considered the two applications, the submissions of both parties and the relevant statute and case law. I will proceed to consider the client's reference first as its determination will have a bearing on whether or not the advocates application for judgment on the taxed costs should be allowed.

9. While awarding Kshs 11,010,106.06. in respect to instruction fees, the taxing master observed that;

“the applicant issued a statutory demand notice to Othaya villas limited on the 5th March 2019. The demand was for Kshs 729,340,404.15 owing to the respondent as at 1st March 2019 the said letter was responded to by Othaya villas limited through his advocates M/s Aluvale & Co advocates vide their letters dated 2nd April 2019 the applicant is therefore entitled to instruction fees pursuant to Paragraph 7 of Schedule V on (Debt collection) In view thereof and based on the demand notice, I tax Item No 1 on instruction fees at Kshs 11,010,106.06.”

10. In opposition to this ruling the client faulted the Taxing Master for equating a statutory demand to a demand letter. According to the client, the notice that was issued by the advocate was meant to set in motion the chargee's power of sale and was not a demand for the outstanding amount. The advocate however argued that at no point did the Taxing Master equate a statutory notice to a normal demand letter.

11. My finding is that a notice issued under the statutory power of sale falls under debt collection for which the applicable schedule is V under paragraph 7. I find that the taxing master applied the correct schedule in coming up with Kshs 11,010,106.06 as the instruction fees. I am guided by the decision in *Paul Semogerere & Olum v Attorney General Civil Application No 5 of 2001* where the court stated;

“In our view, there is no formula by which to calculate the instruction fee. The exercise is an intricate balancing act whereby the taxing officer has to mentally weigh the diverse general principles applicable which sometimes are against one another in order to arrive at a reasonable fee. Thus while the taxing officer has to keep in mind that the successful party must be reimbursed expenses reasonably incurred due to the litigation, and that advocates, remuneration should be as such levels as to attract recruits into the legal profession, he has to balance that with his duty to the public not to allow costs to be so hiked that courts would remain accessible to only the wealthy. Also while the taxing officer is to maintain consistency in the level of costs, it is settled that he has to make an allowance for the fall if any in the value of money. It is because of consideration for this intricate balancing exercise that taxing officer's opinion on what is the reasonable fee, is not to be interfered with lightly. There has to be a compelling reason to justify that interference.

12. Guided by the dictum in the above cited case, I find that the client has not given any compelling reasons to warrant this court's interference with the Taxing Officer's decision on taxation as there was no error of principle and the fee awarded was not manifestly excessive. I therefore find that the instant reference is not merited and I therefore dismiss it with costs to the advocate.

13. On the second application, the question is whether judgment should be entered for the advocate against the client for Kshs. 12,835,789.83/= on account of taxed advocate- client legal costs. Having dismissed the reference, the advocate's application automatically succeeds. Section 51(2) of the Advocates Act which gives this court the mandate to enter judgment for the costs recovered stipulates as follows;

“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.”

14. 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.”

15. Given that the 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 Twelve million, Eight Hundred and Thirty-Five Thousand and Seven hundred and Eighty-Nine and Eighty-Three Cents. (12,835,789.83/=). The applicant is further awarded costs plus interest from the day of the judgment pursuant to Rule 7 of the Advocates (Remuneration) Order which stipulates that:

“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.”

16. It is so ordered.

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. Makori for the client.

Mr. Orinda advocate in person.

Court Assistant: Sylvia