



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

MILIMANI LAW COURTS

MISC APPLICATION NO 336 OF 2012

IN THE MATTER OF THE ADVOCATES/CLIENT BILL OF COSTS

MEREKA & COMPANY ADVOCATESADVOCATE

VERSUS

ZAKHEM CONSTRUCTION (KENYA) LTD.....CLIENT

RULING

1. The Client's Notice of Motion application dated and filed on 18th December 2017 was filed pursuant to the provisions of Section 3A of the Civil Procedure Act, Cap 21 (Laws of Kenya) and Paragraph 11(2) of the Advocates Remuneration Order. Prayer No 1 was spent. It sought the following remaining orders:-

1. Spent

2. THAT there be a stay of execution of the taxed costs of Kshs 6,981,265.00/= pending the interpartes hearing and pending the hearing and determination of this reference.

3. THAT the Honourable court be pleased to vary and/or set aside the decision and ruling of the Taxing Master delivered on 23rd November 2017 and remit the advocate-client bill of costs dated 18th June 2012 to a different Taxing Master for taxation.

4. THAT costs of the application be provided.

2. The Client's Written Submissions were dated 10th April 2018 and filed on 12th April 2018. Its List of Bundle of Authorities was dated and filed on 17th January 2018. The Advocate's Written Submissions were dated 11th May 2018 and filed on 14th May 2018. These were further to its Written Submissions that were dated and filed on 28th February 2018.

3. Parties asked this court to render its decision based on the respective Written Submissions that they had relied upon in their entirety. The Ruling herein is therefore based on the said Written Submissions.

THE CLIENT'S CASE.

4. The Client's application was supported by the Affidavit of one of its Directors, Adnan Annous that was sworn on 18th December 2017. He swore a Supplementary Affidavit on 27th February 2017. The same was filed on 28th February 2018.

5. The gist of the Client's case was that the Advocate did not render any legal services and that in any event, the Taxing Master proceeded on the wrong principle by basing the instruction fees on project costs and not on the Bills of Quantities. It averred that in any event, the services that were rendered by the Advocate were not within the purview of the Advocates Remuneration Order, 2009 because they were not legal in nature. It averred that she did not identify the work done.

6. It was also emphatic that it filed its reference within fourteen (14) days of receiving the Taxing Master's decision on 8th December 2017 at the Registry. It was also categorical that its present application was not *res judicata* that the Taxing Master arbitrarily arrived at the

instruction fees.

7. It therefore urged this court to allow its application as prayed.

THE RESPONDENT'S CASE

8. In opposition thereto, the Advocate filed Grounds of Opposition dated and filed on 16th January 2018. The grounds could be summarised as follows:-

- 1. THAT the present application was filed outside the fourteen (14) days stipulated in Rule 11 (1) of the Advocates Remuneration Order.**
- 2. THAT the matters raised in the application were *res judicata* as the same had been dealt with by the Court of Appeal.**
- 3. THAT the Client had not met the conditions for being granted an order for stay of execution.**
- 3. THAT advocates fees are not pegged on completion of a project but on the value of the subject matter that can be determined from the pleadings.**
- 5. THAT the Client could not be granted the orders it had sought because it had not challenged the Certificate of Costs which was issued as per Section 51(2) of the Advocates Act Cap. 16 Laws of Kenya.**
- 6. THAT the present application was ambiguous, oppressive, made in bad faith, an abuse of the court process that was meant to delay his fees for work done eight (8) years ago.**

9. In addition, David Mukui Mereka, its Managing Director swore a Replying Affidavit on 16th January 2018. It was filed on even date. It set out a chronology of the matter starting with the dismissal of the Client's Preliminary Objection on retainer by Ougo J, which Ruling was subsequently upheld by the Court of Appeal.

10. It also stated that the application was defective as the Client did not point out the items it was objecting to. It wondered why if the Client was contending that there was no legal work, the Ruling of the Taxing Master should be set aside and the matter referred to another Taxing Master for taxation of its Bill of Costs.

11. It was its contention that the Taxing Master took into account the work done, importance, skill and labour required and it was therefore not necessary for her to identify the work and labour required.

12. It therefore urged this court to dismiss the present application.

LEGAL ANALYSIS

13. This court carefully considered the parties' Written Submissions and noted that the issues that had been placed before it for determination were:-

- 1. Whether the Client's application was filed within time;**
- 2. Whether the Client's application was *res judicata*;**
- 3. Whether the Taxing Master erred in awarding the Advocate a sum of Kshs 6,000,000/= as instruction fees.**

14. The court therefore found it prudent to deal with the issues under distinct and separate heads.

I. COMPETENCE OF THE CLIENT'S APPLICATION

15. The Client submitted that its application was filed within the stipulated period. It was emphatic that time for filing a reference started running from 8th December 2017 when it obtained the Ruling for Taxation dated 23rd November 2017 from the Registry because when the Taxing Master delivered her decision, she did not read her Ruling but only read the amount that had been taxed off and the amount that was allowed. It therefore argued that the time to file its reference was to lapse on 22nd December 2017.

16. It added that the Advocate's admission that it sent it a copy of the Ruling of Taxation vide its letter of 1st December 2017, which it said received on 4th December 2017, still meant that it had until 18th December 2017 to file its reference. It relied on the provisions of Paragraph 11(2) of the Advocates Remuneration Order in this regard.

17. On its part, the Advocate was emphatic that the said reference was filed outside the stipulated timelines. It relied on the cases of **Governors Ballon Safaris Ltd vs Skyship Co Ltd & Another [2015] eKLR**, **Evans Thiga Gaturu Advocate vs Kenya Commercial Bank Ltd [2012] eKLR** and **A.N. Kimani & Co Advocates vs Trident Insurance Co Ltd [2016] eKLR** where the common thread was that the reasons contained in a ruling of a taxing master are sufficient for purposes of filing a reference and that time starts running from the

date of delivery of such decision.

18. Paragraph 11(2) of the Advocates Remuneration Order stipulates as follows:-

“The taxing officer shall forthwith record and forward to the objector the reasons for his decision on those items and the objector may within fourteen days from the receipt of the reasons apply to a judge by chamber summons, which shall be served on all the parties concerned, setting out the grounds of his objection.”

19. It was therefore the view of this court that time only starts running when an aggrieved party is seized of the reasoned ruling of the taxing master. The relevance of the date when such aggrieved party becomes seized of the ruling is of paramount importance because it is only after reading the reasons that he determines whether or not he will file a reference to the High Court.

20. Bearing in mind that the Applicant submitted that the Taxing Master only read the amounts that were taxed off and the amount that was allowed as taxed costs and not the reasons, which the Advocate did not counter, time could not be said to have run from that date.

21. Whichever way one looks at it, whether the Client obtained a copy of the ruling on 8th December 2017 or the Respondent sent it a copy of the Ruling on 4th December 2017, the Client filed its Reference within the fourteen (14) days stipulated in Paragraph 11(2) of the Advocates Remuneration Order because those days could either have lapsed on 22nd December 2017 or 18th December 2017 respectively.

22. The case of N.W. Amolo t/a Amolo Kibanya & Co Advocates vs Samson Keengu Nyamweya [2016] eKLR that was relied upon by the Advocate in which it was held that an aggrieved party has an opportunity to apply for enlargement of time to file his reference was thus distinguishable from the facts of this case as it was not necessary for the Client to have sought for enlargement of time to file its Reference, this court having determined that its Reference was filed within the stipulated period under the law.

II: RES JUDICATA

23. The Client submitted that the matter herein was not *res judicata* for the reason that the court of Appeal held in the case of Civil Appeal No 365 of 2014 Zakhem Construction (K) Ltd vs Mereka & Co Advocates that:-

“The foregoing does not mean that the respondent is entitled to fees as claimed in the bill of costs. The nature and scope of instructions and the fees to which the respondent may be entitled to claim is a matter for the taxing master to determine”.

24. It was its contention that the Taxing Master failed to comply with the directions of the Court of Appeal because she did not determine:-

i. The nature and scope of instructions;

ii. The fee to which the Respondent was entitled to;

iii. Whether the Respondent’s Bill of costs could be taxed under Schedule V of the Advocates Remuneration Order.

25. On its part, the Advocate argued that the Reference was *res judicata* because the issues raised therein had been determined by the Court of Appeal. It stated that the question of whether or not there was an advocate-client relationship between the Advocates and the Client herein was answered in the affirmative by the Court of Appeal in which upheld the Ruling of Ougo J on the question of the retainer of the Advocates by the Client.

26. It cited the holding of the Court of Appeal in which it stated as follows:-

“.....can it be said the Respondent did not have the Appellant’s authority to act for it? We do not think so. We agree entirely with the learned Judge.”

27. It also referred to the provisions of Section 7 of the Civil Procedure Act which provides as follows:-

“No court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim, litigating under the same title, in a court competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such court”.

28. This court considered all the parties Written Submissions on the question of the Client’s present application having been *res judicata* and noted that if it was to start analysing and pronouncing itself on the question of the whether or not there was an advocate-client relationship between the Advocates and the Client, that would be re-opening litigation on that issue when the Court of Appeal had already pronounced itself on the issue.

29. As the Court of Appeal had found that there was an advocate-client relationship between the Advocate and the Client that did not estopp the Client from contending that the Taxing Master that erred in law and principle in assessing and taxing the Advocate-Client Bill of Costs dated 18th June 2012 on the ground that the nature of the instructions and project management work undertaken by the Advocate did not fall within the purview and scope of professional work under the Advocate Remuneration Order.

30. This is because there could have been an advocate-client relationship between the Advocate and the Client but the nature and scope of instructions and the fee payable might not have been discernible from the Bill of Costs. It was therefore the considered view of this court that whereas the Client could not question whether or not there was an advocate-client relationship between it and the Advocates, it could question whether the Taxing Master had determined:-

i. the nature and scope of instructions

ii. the fee to which the Advocates were entitled to.

31. This court was thus persuaded to find in the Client's favour that its present application was not *res judicata* as had been contended by the Advocates.

III. QUANTUM OF TAXED COSTS

32. The Client submitted that the Taxing Master committed grave errors of principle by applying Schedule V of the Advocates Remuneration Order which does not provide a specific scale on fees and further that after alluding to the same in her Ruling, she misdirected herself by failing to consider and apply them to the assessment of the instruction fees.

33. It further submitted that the Taxing Master erred in principle in basing instruction fees on the value of projected costs of Ksh 690,929,845/= as was provided in the Valuation Report of Protocol Solution and ignoring the total project costs at Ksh 178,445,120/= as was contained in the Bill of Costs. It was its contention that the proposed development on its property L.R. No 7200/4 was never approved and did not break ground as it fell through the inception stages.

34. It placed reliance on the case of **Shella Sheikh vs Shella Sheikh t/a Shella Sheikh & Associates vs Pentecostal Assemblies of Canada [2016] eKLR** where it was held that the taxing master therein was correct in not relying on a Valuation Report to determine the value of the subject matter because in the instant case, the said Report had no probative value and that the figure was simply plucked from the air as the project never commenced.

35. It also referred to the case of **Kipkorir Titoo & Kiara Advocates vs Deposit Protection Fund [2005] eKLR** where the Court of Appeal faulted the learned judge for having adopted the value of the subject matter supplied by the Appellant's counsel in assessing the instruction fee.

36. It added that the taxing master arbitrarily arrived at the instruction fees and did not identify the work done. It averred that the Advocate's work was limited to receiving, perusing and forwarding copies of the project proposal and building plans presented by Protocol Solutions Ltd and other contracted experts.

37. On its part, the Advocate argued that it was irrespective if the construction of the project was completed because it was the Contractor's work that did not commence but that its instructions were executed to the fullest. It referred this court to the case of **First American vs Shah & Others [2002] I EA** where it was held that the full instructions to defend a suit are earned the moment a defence is filed and the subsequent progress of the matter if irrelevant.

38. It was emphatic that the Taxing Master did not commit any error and as there was no contest of work done, it was not necessary for her to identify the work done. It added that the same was not an issue before her because the work was captured in its Bill of Costs.

39. It stated that the Client had introduced new grounds and was emphatic that the Taxing Master took into account all the relevant factors including value of the subject matter.

40. This court carefully looked at the Taxing Master's Ruling on Taxation dated 23rd November 2017 and noted that save for relying on Schedule V of the Advocates Remuneration Order Part II that stipulates that **"Instruction fees will be charged having regard to the care and labour required, the number and length of the papers to be perused, the nature on importance of the matter, the amount or the value of the subject matter involved, the complexity of the matter..."** and determining that the Advocate was entitled to Kshs 6,000,000/= as instruction fees, having taxed off a sum of Kshs 1,500,000/=-, she did not make a finding on the nature and scope of instructions as had been observed by the Court of Appeal in **Civil Appeal No. 365 of 2014 Zakhem Construction (Kenya) Ltd vs Mereka & Co Advocates**. She only determined one aspect of what she was expected to do.

41. Indeed, the Court of Appeal had in **Civil Appeal No 365 of 2014 Zakhem Construction (Kenya) Ltd vs Mereka & Co Advocates** rendered itself as follows:-

"....The nature and scope of instructions (emphasis court) and the fee to which the Respondent may be entitled to claim in the matter is for the taxing officer to determine."

42. This was despite both the Advocate and Client extensively submitting on what constituted nature and scope of work. In fact, they also relied on several cases to buttress their respective cases.

43. She did not also justify why Schedule V of the Advocates Remuneration Order was the appropriate Schedule of the taxation despite the said issue also having been submitted before her for determination. She merely stated that:-

"That applicable law is Schedule V of the Advocates Remuneration Order (2009)"

44. Further, she relied on the value of the subject matter at Kshs 640,929,845/= as had been indicated in the Valuation Report that had been prepared in September 2010. She did not address her mind to and/or distinguish the case of **Shella Sheikh vs M/s Shella Sheikh & Associated vs Pentecostal Assemblies of Canada** (Supra) that had been relied upon by the Client in the taxation before her to justify why she had adopted the said value. This is because in that case, the court had held that the valuation could not have assisted the Taxing Master to reach a fair assessment of the instruction fees.

45. The question of whether the projected costs of Kshs 640,929,845/= ought to be the basis of the instruction fees was best addressed and determined by the Taxing Master. The question of whether she would have arrived at a corrected conclusion would then be an issue to be addressed in a reference at the High Court.

46. Accordingly, having considered the Affidavit evidence, the Written Submissions and the case law that was relied upon by both parties, this court came to a firm conclusion that the decision of the Taxing Master of 27th November 2017 fell short of having given reasons to justify why she arrived at the conclusions that she did. It was too sketchy and did not analyse the weighty issues that had been placed before her for determination. It is only fair that the observations that were made by the Court of Appeal be addressed.

DISPOSITION

47. For the foregoing reasons, the upshot of this court's decision was that the Client's Notice of Motion application dated and filed on 18th December 2017 was merited and the same is allowed in terms of Prayer Nos (2) & (3) herein. Costs shall be in the cause.

48. It is so ordered.

DATED and DELIVERED at NAIROBI this 27th day of June 2019

J.KAMAU

JUDGE