



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

COMMERCIAL AND TAX DIVISION

MISC. APPLICATION NO.313 OF 2018

**OLUOCH OLUNYA & ASSOCIATE ADVOCATES.....APPLICANT**

**VERSUS**

**PARKLANE CONTRUCTION LIMITED.....RESPONDENT**

**RULING**

1. Through chamber summons application dated 25<sup>th</sup> February 2019, the Applicant/client herein, Parklane Construction Limited, sought the following orders:

*1. That the Honourable court be pleased to vacate and set aside in its entirety the ruling and reasoning of the learned Taxing Master Honourable S.A. Opande (DR) dated and delivered on 24<sup>th</sup> January, 2019 taxing the Advocate/Respondent's Bill of Costs dated 7<sup>th</sup> July, 2018 at kshs 859,329.83/=.*

*2. That the honourable court be pleased to re-assess the quantum of total fees and Value Added Tax chargeable in the Advocate/Respondent's Bill of Costs.*

*3. That in the alternative to prayer (2) above, the Honourable Court be pleased to remit the Bill of costs dated 7<sup>th</sup> July 2018 for re-assessment of the quantum of total fees and Value Added Tax chargeable before the Taxing Master or a different Taxing Master with appropriate directions thereof.*

*4. That the cost of this application be provided for.*

2. The application is brought under Rule 11(2) of the Advocates (Remuneration) Order (ARO) and is supported by the affidavit of the applicant's director, **Govind Lakhman Kerai**, sworn on 25<sup>th</sup> February 2019. The application is brought in the grounds that the Taxing Master acted contrary to the well settled principles of law and arrived at a decision that was erroneous, unreasonable and legally untenable by awarding costs that were exaggerated and excessive. He contends that the Taxing Master failed to note that parties had already agreed on a final fee note at kshs. 1,044,000 which sum the client had paid in full as at 2<sup>nd</sup> July 2018.

3. It was therefore the applicant's case that the award of fees by the taxing master was unreasonable, unjustified and violated the principles governing the award of costs.

4. The advocate/respondent opposed the application through the replying affidavit dated 30<sup>th</sup> April 2019 wherein he seeks the dismissal of the application on the basis that it lacks merit, is bad in law and defective in view of the fact that the client failed to pay the outstanding legal fees when the same fell due and only settled the balance on 2<sup>nd</sup> July 2018 two months after the demand notice had expired thereby necessitating the taxation of the advocates bill of costs.

5. The advocate states that even though a final fee note was issued to the applicant, the same did not amount to a valid fee agreement between the parties but was a conditional offer incapable of enforcement as envisaged under Section 45(1) of the Advocates Act.

6. Parties filed written submissions to the application which I have carefully considered. The main issue for determination is whether the applicant is entitled to the orders sought in the application.

7. It was not in dispute that the applicant engaged the advocate to act for it in court action in which the subject matter was determined to be kshs 60,404,249.22. It was also not in dispute that the advocate and the client held discussions and agreed that the advocate would be paid kshs 1,044,000 as his professional fees. The said agreement was however on condition that the fees would be paid within 7 days failure of

which the advocate would be at liberty to tax his Bill of Costs. The client did not pay the legal fees within the stipulated period thereby necessitating the filing of the advocates Bill of costs.

8. While the applicant/client contends that the amount of legal fees payable to the advocate had been agreed upon and was therefore not supposed to be the subject of taxation of Bill of Costs, the advocate contends that the legal fees was not agreed upon as is required under Section 45(1) of the Advocates Act and was therefore capable of being subjected to taxation.

9. Section 45(1) of the Advocates Act stipulates as follows:-

**Agreements with respect to remuneration**

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

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

**(b) before, after or in the course of any contentious business in a civil court, make an agreement fixing the amount of the advocate's instruction fee in respect thereof or his fees for appearing in court or both;**

**(c) before, after or in the course of any proceedings in a criminal court or a court martial, make an agreement fixing the amount of the advocate's fee for the conduct thereof, 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.**

10. In the case of *Omulele & Tollo Advocate v Mount Holdings Limited* [2016] eKLR the court held as follows:-

***“From the foregoing it should thus be clear that the presence of a retainer is what in turn gives to the retainer agreement. In other words, only when the engagement and the terms thereof have been agreed upon, can the same be reduced into writing. It also follows that for the retainer agreement to be valid and binding, the same must have been put in writing and signed by the client and or his agent.”***

11. In the instant case, I note that the Taxing Master considered the issue of whether the parties signed an agreement on the fees payable to the advocate and held as follows:

***“It therefore behoves upon the respondent to provide proof of an agreement of provide the 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 the 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.”***

12. Having found, as a fact, that there was no written and signed agreement on the fees, I am of the humble view that there was no error or misapprehension of the principles governing taxation of Bill of Costs when the Taxing Master proceeded to tax the advocates Bill of Costs.

13. Turning to the prayer for reassessment quantum of total fees and Value Added Tax payable, the applicant argued that the same was excessive, unreasonable and unjustified while the advocate maintained that the same was taxed on scale.

14. It is a well-established principle of review that the exercise of the Taxing Master's discretion will not be interfered with ‘unless it is found that he/she has not exercised his/her discretion properly, as for example, when he/she has been actuated by some improper motive, or has not applied his/her mind to the matter, or has disregarded factors or principles which were proper for him/her to consider, or considered others which it was improper for him/her to consider, or acted upon wrong principles or wrongly interpreted rules of law, or gave a ruling which no reasonable man would have given.’ (See *Preller S Jordaan and Another* [1957 \(3\) SA 201](#) (O) at 203C – E)

15. The principles governing taxation of costs by a Taxing Master laid out in the above cited case were reiterated in the leading case of *Phemchand Raichand Ltd Another v Quarry services of East Africa Ltd and Another* (1962) EA as follows: -

***i. The instruction fee should cover the advocates work including taking instructions and preparing the case for trial or appeal.***

***ii. The taxing master was expected to tax each bill on its merits;***

***iii. The value of the subject matter had to be taken into account;***

***iv. The taxing master's discretion was to be exercised judicially and not whimsically or capriciously;***

***v. Though the successful litigant was entitled to a fair reimbursement, the taxing master had to consider the public interest such that costs were not allowed to rise to a level that would confine access to the courts to the wealthy.***

***vi. No appeal or reference can be allowed unless the appellant can show or demonstrate that above mentioned principles have been breached because judges on appeal as a principle do not like to interfere with an assessment of costs by the taxing officer***

***unless the officer has misdirected himself or herself in a matter of principle, but if the quantum of an assessment is manifestly extravagant, a misdirection of principle may be a necessary inference.***

16. Applying the above principles to the present case, I wish to reiterate that it is not open to this court to interfere with the Taxing Master's decision on costs unless it is proved that the amount taxed was manifestly excessive or low. The court can also interfere with the Taxing Master's award of costs if there is proof that the taxing officer followed a wrong principle in reaching his decision.

17. The applicant contended that the amount awarded as costs was exaggerated and unreasonable while the advocate maintained that the award on costs was commensurate with the value of the subject matter of the suit in which the advocate acted for the client.

18. The Taxing Master held as follows on the subject of instructions fees:

***“Looking at the bill, the instructions fees is drawn at Kshs. 944,404.18. Since the settlement agreement dated 23<sup>rd</sup> March 2018 settled this matter and others at Kshs. 60,404,249.22, the same shall form the subject matter of the suit. Under Schedule 6 the instructions fees therefore should be 85% of 1,111, 063.70 which is the amount chargeable on the subject matter. This gives instructions fees of Kshs. 944,404.18. The rest of the items though unopposed, I find them drawn to scale.”***

19. Having regard to the above finding by the Taxing Master, I am unable to find that she misdirected herself on the principles governing taxation of bills of costs. The Taxing Master considered the subject matter of the suit and the applicable scale under the Advocates Remuneration Order before arriving at the amount payable for instructions fees. I further find that the award on instructions fees was on scale and cannot therefore be said to be unreasonable or manifestly exaggerated so as to warrant the interference with the Taxing Master's decision by this court.

20. Consequently and having regard to the findings that I have made in this ruling, I find that the instant application is not merited and I therefore dismiss it with no orders as to costs.

**Dated, signed and delivered in open court at Nairobi this 31<sup>st</sup> day of October 2019.**

**W. A. OKWANY**

**JUDGE**

**In the presence of:**

Miss Odunga for Lusi for defendant/applicant

Miss Opondo for Oluoch Olunga for respondent/advocate

Court Assistant – Sylvia