



**THE REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT MACHAKOS**

**MISCELLANEOUS CIVIL APPLICATION NO 176 OF 2014**

**IN THE MATTER OF THE ADVOCATES ACT CAP 16**

**AND**

**IN THE MATTER OF COSTS AS BETWEEN ADVOCATE AND CLIENT**

***BETWEEN***

**FRANCIS MWANZA MULWA.....ADVOCATE/APPLICANT**

**VERSUS**

**GEORGE MUTUKU MASAI.....CLIENT/RESPONDENT**

**RULING**

1. The applicant brought the chamber summons application dated 31.8.2018 under Paragraph 11(2) of the Advocates (Remuneration).
2. The applicant sought orders setting aside the decision of the Taxing Master dated **2<sup>nd</sup> August, 2018** taxing the applicant's Bill of Costs. The applicant further seeks orders that this Court re-taxes the said Bill or remit the Bill back to the Taxing Master for re-taxation.
3. The grounds in support of the application are:- **(i)** that the taxing officer invoked schedule v of the Advocates Remuneration Order 1962 instead of Schedule 1 of the Advocates (Remuneration)(Amend-ment) Order 2014; **(ii)** that the decision was based on an error of principle for it was contrary to paragraph 21 of the Advocates (Remuneration) Order ; **(iii)** that the award of Kshs 50,000 in respect of instruction fees was not up-to scale as per Schedule 1 of the Advocates (Remuneration)(Amendment) Order 2014.
4. The application is supported by the affidavit of **Francis Mwanza Mulwa** sworn on 31<sup>st</sup> August, 2018. He averred that his advocate-client bill of costs was taxed and ruling delivered on 2.8.2018 and that the amount charged under item 1 of Kshs 662,250/- was up-to scale as per Schedule 1 of the Advocates (Remuneration)(Amend-ment) Order 2014. It was averred that the respondent was in agreement that the item 1 be allowed and the taxing officer allowed a sum of Kshs 50,000/- in item 1 and taxed off Kshs 616,250/- having wrongly invoked Schedule v instead of schedule 1 yet the applicant had made no election in terms of paragraph 22 of the Advocates (Remuneration) Order. It was averred that the taxing officer's decision was contrary to the provisions of paragraph 21 of the Advocates Remuneration Order and the consideration figure contained in the agreement of sale.
5. The Respondent filed a replying affidavit on **17<sup>th</sup> January, 2019** averring that:- **(a)** the amount taxed was not low as the advocate only drafted an agreement and there was nothing related to conveyancing that the advocate did ; **(b)** that advocate was handling other matters for the respondent and the respondent was in a hurry and left documentation with the advocate with an intimation that they would agree later on the fees and was later surprised to hear that the advocate sent a draft agreement to the purchaser's email and pursuant to which the advocate filed a bill of costs; **(c)** that the reference was not filed within 14 days of the ruling, the same was filed on 31.8.2018 and yet the ruling was delivered on 2.8.2018 ; and, **(d)** that the respondent filed an application seeking to determine whether or not there was an advocate-client relationship and it was directed that the matter proceeds for taxation first.
6. In his submissions, **F.N. Mulwa and CO Advocates** for the applicant argued that the written instructions in the draft sale agreement annexed to the bill of costs was Kshs 42,750,000/- and the scale fees provided for is **Ksh. 666,250/=**, and faulted the Taxing Master for allowing a sum of **Ksh. 50,000/=** which he argued is unreasonably low, based on wrong principle and invocation of Schedule v instead of schedule 1. He also argued that material exhibits impute an advocate-client relationship and the same were instruction note in the respondent's handwriting, copy of title deed, email correspondence and draft agreement of sale drawn by the applicant. It was his submission that the reference be allowed.
7. **Manthi Masika & Co Advocates** for the Respondent submitted that the taxing master had no jurisdiction to deal with an application to

determine the issue of retainership. Counsel added that the work was not completed and reliance was placed on **Odera Obar & Co Advocates v Gaoyu International Co Ltd (2014) eKLR** and added that the conveyance did not mature. According to counsel, invocation of Schedule 5 would apply where the transaction is completed and if there was an advocate-client relationship, hence the reference ought to be dismissed with costs as the registrar relied on the correct provision of the law in awarding the amount awarded.

8. The issues for determination are whether the taxing officer had jurisdiction to handle the matter; whether the reference is properly before the court and whether the court may allow the reference and set aside the decision of the taxing master.

9. In response to the 1<sup>st</sup> issue, A Judicial Officer sitting to tax a bill of costs between an advocate and his or her client, must determine the question whether he/she has jurisdiction to tax a Bill if the issue of want of advocate/client relationship is raised. An allegation that the advocate/client relationship does not exist in taxation of an advocate/client Bill of Costs must be determined at once. The Taxing Officer has jurisdiction to determine that question.

10. A decision in taxation where an advocate/client relationship does not exist is a nullity for want of jurisdiction. As Nyarangi, JA. stated in the memorable words in the **“MV Lilian S” [1989] 1 KLR** case-

***“Jurisdiction is everything, without it, a Court has no power to make one more step. Where the Court has no jurisdiction, there would be no basis for a continuation of proceedings pending other evidence. A court of law downs tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction.”***

11. From the finding of the taxing officer, she was satisfied that an advocate-client relationship existed hence proceeded to tax the bill and in this regard I am satisfied that she had jurisdiction to handle the matter.

12. With regards to the 2<sup>nd</sup> issue, the respondent had challenged the applicant for failing to file a reference within 14 days. Paragraph 11 of the Advocates’ Remuneration Order provides as follows:

***“11. Objection to decision on taxation and appeal to Court of Appeal.***

***(1) Should any party object to the decision of the taxing officer, he may within fourteen days after the decision give notice in writing to the taxing officer of the items of taxation to which he objects.***

***(2) 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.***

***(3) Any person aggrieved by the decision of the judge upon any objection referred to such judge under subparagraph (2) may, with the leave of the judge but not otherwise, appeal to the Court of Appeal.***

***(4) The High Court shall have power in its discretion by order to enlarge the time fixed by subparagraph (1) or subparagraph (2), [and] may, with the leave of the judge but not otherwise, appeal to the Court of Appeal.***

13. From the record, the reasons for the decision of the taxing master were sought on 10.8.2018 and it is unclear when they were received. However there is indication that a response was rendered on 17.8.2018 and the application being filed on 31.8.18 was well within 14 days of the receipt of the decision hence the reference is properly within the court and the challenge imputed by the respondent lacks merit.

#### **The principles applicable to a review of a taxing master’s decision**

14. The general principles governing interference with the exercise of the taxing master’s discretion were authoritatively stated by in **First American Bank of Kenya v. Shah and Others [2002] 1 EA 64**, as follows;

***a) 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 inference that it was based on an error of principle;***

***b) It would be an error of principle to take into account irrelevant factors or to omit to consider relevant factors and, according to the Remuneration Order itself, some of the relevant factors to be taken into account include the nature and the importance of the cause or matter, the amount or value of the subject matter involved, the interest of the parties, the general conduct of the proceedings and any direction by the trial judge;***

***c) If the Court considers that the decision of the Taxing Officer discloses errors of principle, the normal practice is to remit it back to the taxing officer for reassessment unless the Judge is satisfied that the error cannot materially have affected the assessment and the Court is not entitled to upset a taxation because in its opinion, the amount awarded was high;***

***d) It is within the discretion of the Taxing Officer to increase or reduce the instruction fees and the amount of the increase or reduction is discretionary;***

***e) The Taxing Officer must set out the basic fee before venturing to consider whether to increase or reduce it;***

*f) The full instruction fees to defend a suit are earned the moment a defence has been filed and the subsequent progress of the matter is irrelevant to that item of fees;*

*g) The mere fact that the defendant does research before filing a defence and then puts a defence informed of such research is not necessarily indicative of the complexity of the matter as it may well be indicative of the advocate's unfamiliarity with basic principles of law and such unfamiliarity should not be turned into an advantage against the adversary.*

15. The scope of this application requires this court to be satisfied that the Taxing Master was clearly wrong before interfering with her decision. The applicant challenges the amount awarded whereas the respondent challenged the existence of an advocate-client relationship. With regard to the issue of advocate-client relationship, the evidence that was presented on record that was unchallenged by the respondent was that he was given instructions to act in a specific land purchase transaction. He tendered in evidence instruction note in the respondent's handwriting, copy of title deed, email correspondence and draft agreement of sale drawn by the applicant and the respondent in his replying affidavit had not denied delivering the same to the applicant. In this regard I am satisfied that there was an advocate-client relationship in respect of the specific transaction but not a retainer. A retainer is an agreed-upon amount of money that a client deposits with his or her advocate as a reserve to cover anticipated work the client may require and expenses to the end of each billing period. The advocate uses the money in the retainer fund by drawing it down to meet the client's monthly invoices. The retainer is in effect a down payment that will be applied toward the total fee billed or is money paid in advance before any legal work is done that is set aside to pay those fees as the advocate earns them and meet disbursements as they are incurred. Under this arrangement, a client pays a set amount of money regularly to make sure that an advocate will be available for any necessary legal service the client might require. By paying a retainer, a client receives routine consultations and general legal advice whenever needed. In some cases to have an advocate on retainer means that the client pays an advocate a small amount on a regular basis. In return, the advocate performs some legal services whenever the client needs them. If a legal matter requires courtroom time or many hours of work, the client may need to pay more than the retainer amount. Most clients do not see an advocate regularly enough to need an advocate on retainer. Retainer agreements should always be in writing.

16. On the other hand, an advocate's fee is what the advocate charges for the services the client asks him or her to perform, usually identified in a fee agreement that states how much the client agrees to pay the advocate for each transaction or each hour of his or her time. Where there is no fee agreement, as in this case, the advocate should present an advocate / client bill of costs containing the costs that an advocate claims from his own client and which the advocate is entitled to recover from a client, for professional services rendered to and disbursements made on behalf of the client. See **In Re An Advocate; In Re A Taxation of Costs [1955] 2 QB 252**.

17. From the pleadings on record, the bill of costs was filed in court and annexed was a draft sale agreement and that is all. In **Republic versus The Minister of Agriculture ex parte W'njuguna & Others [2006] 1 EA 359 (HCK)**, it was observed that; "Since costs are the ultimate expression of essential liabilities attendant on the litigation event, they cannot be served out without either a specific statement of the authorizing clause in the law, or a particularized justification of the mode of exercise of any discretion provided for. The complex elements in the proceedings that guide the exercise of the taxing officer's discretion must be specified cogently and with conviction."

18. In **Premchand Raichand Ltd Another v Quarry services of East Africa Ltd and Another [1972] EA 162** The instruction fee should cover the advocates work. As gleaned from the pleadings the work that the applicant did was drafting of the agreement hence I agree with the respondent that the advocate could not charge for work that was not completed. He has not presented anything to show that he completed the conveyance transaction. I agree with the findings of the taxing officer and see no merit in the application as she considered all the issues from all angles. The request for a re-taxation is not tenable in the circumstances.

19. In the result it is my finding that the application dated 31.8.2018 lacks merit. The same is dismissed with costs.

It is so ordered.

Dated and delivered at **Machakos** this **19<sup>th</sup>** day of **December, 2019**.

**D. K. Kemei**

**Judge**