



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

MISC. CIVIL APPLICATION NO. 281 OF 2017

IN THE MATTER OF TAXATION BETWEEN ADVOCATE AND CLIENT

BETWEEN

KADIMA & COMPANY ADVOCATES.....ADVOCATES/APPLICANT

AND

FATUMA ATHMAN ABUD FARAJ.....CLIENT/ RESPONDENT

RULING

1. Through a Chamber Summons dated 19th April, 2018, brought under paragraph 11(2) of the Advocates Remuneration Order, the respondent (applicant) seeks the following orders:-

(i) That this Honourable court be pleased to set aside or vary the decision of the Learned Deputy Registrar delivered on the 29th March, 2018 and the respondent's bill of costs dated 7th November, 2017 be taxed afresh by this Honourable court; and

(ii) That the costs of this application be provided for.

2. The application is supported by the affidavit of Fatuma Athman Abudh Faraj sworn on 19th April, 2018 and the grounds in support of the application. She filed a further affidavit on 12th July, 2018. The applicant had prior to filing the application filed a notice of objection as required under the provisions of paragraph 11(1) of the Advocates (Remuneration) Order as amended in the year 2009. The applicant (respondent) swore a replying affidavit sworn on 6th July, 2018, to oppose the application.

3. The applicant in arguing her application stated that the bill of costs dated 7th November, 2017 was taxed at an excessive amount. She submitted that an agreement was drafted after she instructed Mr. Kadima Advocate to represent her in Mombasa HCCC No. 200 of 2015. She indicated that she was required to pay fees at the sum of Kshs. 500,000/= as per the agreement, of which she paid a deposit of Kshs. 250,000/= on 24th April, 2017. She stated that she withdrew instructions on 2nd June, 2017 from Mr. Kadima Advocate due to financial constraints. She added that the said Advocate was making demands for payment yet the case was still ongoing.

4. She submitted that on 22nd June, 2017 she wrote him a reminder that she had withdrawn instructions. She received a response to the effect that out of the deposit of Ksh. 250,000/=, he had deducted Kshs.199,887.40 as his fees and that he would return Kshs. 126,172.60 to her. The applicant informed the court that she wrote to the Law Society of Kenya to complain and in turn they wrote to Kadima & Co Advocates.

5. The applicant stated that in the succession cause in which the said law firm was to act for her, an Advocate attended court but the case was not heard. She further said that the bill of costs filed gave a figure of Kshs. 1.6 Million based on the valuation of the property the subject of the succession cause, yet no valuation was done. She was of the view that Mr. Kadima Advocate should refund her Kshs. 50,000/= in the succession cause. She stated that Mr. Kadima told her he would only charge her for the certificate of urgency application he filed in the said cause. The applicant prayed for her application to be allowed.

6. Ms Mayabi, Learned Counsel for the respondent submitted that in the succession cause, they prepared a certificate of urgency dated 25th May, 2017 which was scheduled for hearing on 20th June, 2017 but the applicant withdrew instructions on 2nd June, 2017. She stated that the applicant had been represented by another Advocate before she went to Kadima & Co. Advocates and her file was voluminous. The same therefore necessitated perusal of the file.

7. On the bill of costs, Counsel indicated that items 4 and 35 were for attending court for filing of court documents. She submitted that the

uncontested items came to Kshs. 558,120/= and that from information given by the applicant, they based the estate at Kshs. 100 Million.

8. Counsel further submitted that the fees of Kshs. 500,000/= was subject to the rider of valuation thus she considered the said amount as the interim fee note. It was submitted further that the applicant was supposed to pay a deposit and the balance of Kshs. 250,000/= by 24th April, 2017 which she did not and as such she was in breach of the agreement.

9. It was argued that even if the court was to take the pecuniary jurisdiction of the succession cause as Kshs. 20 Million, their fees would be Kshs. 798,120.10.

10. I have perused the client/Advocate bill of costs which in item 1 states that the amount charged for receipt of instructions in HC succession cause No. 200 of 2015 at Mombasa with a value of over Kshs. 100 Million, was Kshs. 1,040,000/=.

11. The document attached to the applicant's affidavit marked as FAAF 3 shows that an agreement was signed by the Managing partner of Kadima & Co. Advocates and the applicant on 21st April, 2017 with regard to succession cause 200 of 2015. The agreed fees thereon is reflected as Kshs. 500,000/=, subject to valuation. An amount of Kshs. 250,000/= was to be paid on or before 24th April, 2017. The mode of payment of the balance was to be agreed upon.

12. Section 45(1) of the Advocates Act makes provisions that allow an Advocate to negotiate for his fees with his client. It states as follows:

“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 or after or in the course of any contentious business in a civil court make an agreement fixing the amount of the advocate's instruction fees 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.”

13. The applicant attached to her affidavit a receipt that bears the dates “24th and 25th April”, the applicant paid Kshs. 250,000/=. It cannot thus be said that she paid the deposit late as the receipt which bears the dates “24th and 25th April” originated from the Law firm of Kadima & Co. Advocates. The respondent did not bother to explain why the receipt bore two dates instead of one. It is therefore my finding that applicant paid the deposit within the timeline required as per the agreement. The said amount covered professional fees and did not therefore include disbursements, service of documents and court fees.

14. The applicant in submitting that her property had not been valued has a valid argument. The respondent failed to attach a valuation report or any of the pleadings from the succession cause to show that the value of the properties in the succession cause were worth over Kshs. 100 Million.

15. In a letter dated 27th June, 2017, the respondent wrote to the applicant regarding several briefs it had conduct of. One of them was succession cause No. 200 of 2015 (Mombasa). The respondent indicated that the total costs incurred was Kshs. 199,827.40. I therefore hold that the Hon. Magistrate erred by taxing item 1 of the bill of costs as the applicant withdrew instructions barely two months after giving instructions. As such, the agreement entered into by the parties herein, is the one that carries the day with regard to the professional fees payable to the respondent. The letter dated 27th June, 2017 was not written on a “without prejudice” basis, it is therefore binding on Kadima & Co. Advocates.

16. I however note items No. 29 and 30 are included in the bill of costs, yet costs thereof were deducted from the deposit of Kshs. 250,000/- as per the letter written by the respondent dated 27th June, 2017.

17. In **Steel Constructions Petroleum Engineering (EA) Ltd vs. Uganda Sugar Factory (1970) EA 141**, Spry JA at page 143 stated:

“.....Although a judge undoubtedly has jurisdiction to retax a bill himself he should as a matter of practice do so only to make corrections which follow from his decision and that general rule is that where a fee has to be reassessed on different principles, the proper course is to remit to the same or other taxing officer. I would agree that, as a general statement, that is correct adding only that it is a matter of juridical discretion.”

18. The Court of Appeal in **Joreth Ltd vs Kigano & Associates 2002 1 EA 92** was categorical that **the judge sitting on a reference against the assessment of instructions fee by the taxing officer ought not to interfere with the assessment of costs unless the taxing officer had misdirected himself on a matter of principle.**

19. In the present application, it is clear to me that the Hon. Deputy Registrar misdirected herself in taxing some of the items of the bill of costs in issue. I therefore remit the bill of costs to the lower court for taxation save for items No. 1, 29, 30 and any other item that is captured in the letter dated 27th June, 2017. I also order that the said taxation be given priority to enable the applicant to retrieve her case file from the respondent.

20. Taking into account that the applicant had paid Kshs. 250,000/= to the respondent, the balance due to her is Kshs. 50,172.60. The said amount shall however be held by the respondent until the issue of the taxation of its bill of costs has been determined. The said amount shall be offset from the amount due and owing to the respondent after taxation of the bill of costs. Taxation shall be done by any other Deputy Registrar save for Hon. D. Wasike.

DELIVERED, DATED and SIGNED at MOMBASA on this 28th day of September, 2018.

NJOKI MWANGI

JUDGE

In the presence of:-

Respondent (applicant) present in person

Ms Mayabi for the Applicant (respondent)

Mr. Oliver Musundi - Court Assistant