



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

COMMERCIAL AND ADMIRALTY DIVISION

MISC. APPLICATION NO. 167 OF 2017

PROF TOM OJIENDA & ASSOCIATES.....APPLICANT

-VERSUS-

MUMIAS SUGAR COMPANY LTD.....RESPONDENT

(Being a reference from S. A. Opande (the taxing master's) Ruling dated 15th February 2018 in Nairobi HC Misc 167 of 2017)

RULING

1. Before me is a chamber summons dated **20th March 2018**. It is a reference from the taxation of the taxing master **S. A. Opande**. The said taxing master taxed the advocate/client bill of costs lodged by **Prof. Tom Ojienda and Associates** as the advocates against **Mumias Sugar Co. Limited** as the client. The bill of costs was taxed at **Ksh. 6,086,100.00**. The advocate raised the bill of costs in respect to their appointment by the client, to conduct a legal audit in the year 2014. The bill of costs was opposed before the taxing master by the client. The client raised various objections to all the items in the bill of costs. Those objections purely related to the amount claimed by the advocate.
2. Before this court, however, in this reference the client has not only objected to the items taxed by the taxing master but for the first time raised an issue on whether there was jurisdiction to tax the bill of costs. In raising this issue, the client submitted that the advocates were guilty of material non disclosure. The client went further to submit that the bill of costs was an attempt by the advocates to unjustly enrich themselves.
3. The basis of the objection raised by the client, on jurisdiction is its allegation that there was a contract for the advocates to provide the client with comprehensive legal audit. That under that contract, the advocates' fee was agreed at Ksh 2,420,000. Accordingly the client submitted that the advocates were not entitled to have costs taxed for those services.
4. The advocates in their submissions filed in court on **7th June 2018**, in response to the above submissions by the client responded thus:

*“the applicant/respondent (the advocate) on the **4th April, 2017** filed a bill of costs requiring to be paid a sum of Ksh 10,517,350 for the legal services rendered to the respondent/applicant (the client). The applicant/respondent sought to file the bill of costs herein as the amount as (sic) was agreed upon by the parties was never settled and the applicant/respondent was left no choice (sic) but to tax the bill of costs to scale”.*
5. Whether or not the parties had a contractual relationship in respect to the provision of legal audit of the client, would have ended there since the advocates seemed to have acknowledged from the above quoted portion that an agreement existed between the parties. The advocates did however proceed to submit that the client was not permitted to raise, for the first time, the issue of jurisdiction in what the advocates termed as an appeal.
6. The advocates proceeded to submit that the client failed to raise the issue on jurisdiction before the taxing master and that the taxing master could not therefore have an opportunity to address the issue.
7. In response to allegation of material non disclosure, the advocates drew the court's attention to the fact that that contract was between the client and Professor Otieno Odek, Prof Tom Ojienda and Peter Wanyama. The advocates submitted that the contract was not solely with Prof Tom Ojienda and Associates. Accordingly that the contract referred to by the client having been between the clients and another law firm the advocates in this matter were not parties. For that reason the advocates submitted that they were not guilty material non disclosure.
8. The advocates also submitted that the said contract was invalid for having only been signed by Prof Tom Ojienda and not by the two other advocates that is, Prof Otieno Odek and Peter Wanyama.

9. The advocates submitted that they received fresh instructions from the client to act on its behalf and that it was those instructions that the present bill of costs relate to.

ANALYSIS AND DETERMINATION

10. I have considered the submissions filed by the advocate and the client. Having done so, I will proceed to consider the various issues in contention.

11. The client has based its main objection to the taxed bill of costs on the ground that there existed a contract between the advocates and the client which contract related to the provision by the advocates of comprehensive legal audit of the client.

12. That contract is dated 15th July 2011. It is between Mumias Sugar Company Limited (The client) and Prof Otieno Odek, Prof Ojienda and Wanyama Advocates. Under clause (a) of that contract, it is stated:

“a. The Client has requested the Consultant to provide consulting services to undertake a comprehensive legal audit (hereinafter called the “services”) at a cost of Kenya Shillings Two Million Four Hundred and Twenty Thousands only (Kshs. 2,420,000) inclusive of VAT and disbursements of Kenya Shillings one hundred thousand only (Kshs.100,000).”

13. Further under clause 3.2 (i) of that contract it is provided as follows:

“The remuneration of the Consultant pursuant to this contract shall constitute the consultant’s sole remuneration in connection with this contract or the services and the consultant shall not accept for his own benefit any trace commission, discount or similar payment in connection with activities pursuant to this contract or to the services or in the discharge of his obligations under the contract and the consultant shall use his best efforts to ensure that his personnel, any sub-consultant(s) and agents of either of them similarly shall not receive any such additional remuneration.”

14. The contract, it would be seen, provided the fee payable to the consultant/advocate. Under clause 3.2 (i) the advocates were not permitted to obtain any further payment other than the stated fee of Ksh 2,420,000.

15. That contract was signed only by Prof Tom Ojienda. It was not signed by Prof Otieno Odek nor was it signed by Peter Wanyama

16. The advocates with the bill of costs, submitted that the partnership of Prof Otieno Odek, Prof Tom Ojienda and Peter Wanyama was terminated and thereafter the client gave fresh instructions to the advocates with the bill of costs and that that was the work represented by the bill of costs under consideration.

17. There was no evidence of such termination of the partnership presented to this court. Secondly, as can be seen from the contract, Prof Tom Ojienda signed the contract as the consultant and the consultant in that contract referred to the partnership. Thirdly, there is no evidence brought before court which shows that the advocates with a bill of costs was given fresh instructions by the client.

18. It is hard to believe that a company of the stature of Mumias Sugar Company Limited, which is listed in the stock exchange, would orally instruct the advocate to undertake such an important task, of comprehensive legal audit. This court rejects such a contention. It was incumbent on the advocates to provide evidence of the fresh instructions. Section 107 of the evidence Act Cap 80 so requires. In the absence of evidence of such fresh instructions, it would be the holding of this court that the contract of 15th July 2011 is the one and only which provided for the work undertaken by the advocates. That contract provided for specific remuneration for the consultant/advocates. The advocates with the bill of costs was bound by the terms of that contract. This is rudimentary in the law of contract. The court had an opportunity to pronounce itself in that vein in the case of **Lalji Karsan Rabadia & 2 Others v Commercial Bank of Africa Limited [2015] eKLR.**

“the court has no power to rewrite a contract for the parties as it is based on many authorities including **Wallis v Smith** (supra) where Jessel, Master of the Rolls, stated, thus:-

“I have always thought, and still think, that it is of the utmost importance as regards contracts between adults – persons not under disability, and at arm’s length – that the Courts of Law should maintain the performance of the contracts according to the intention of the parties; that they should not overrule any clearly expressed intention on the ground that judge know the business of the people better than the people know it themselves. I am perfectly well aware that there are exceptions, but they are exceptions of a legislative character.”

See also the decision of this court in the **National Bank of Kenya Ltd v Pipeplastic Samkolit (K) Ltd [2002] 2 EA 503** where it was stated:

“A court of law cannot rewrite a contract, between parties. The parties are bound by the terms of their contract, unless coercion, fraud or undue influence are pleaded and proved. There was not the remotest suggestion of coercion, fraud or undue influence in regard to the terms of the charge. As was stated by Shah JA in the case of Fina Bank Ltd v Spares and Industries Ltd [2000] 1 EA 52: “It is clear beyond peradventure that save those special cases where equity might be prepared to relieve a party from a bad bargain, it is ordinarily no part of equity’s function to allow a party to escape from a bad bargain”.

19. It follows that my finding is that the advocates were bound by the terms of the contract dated **15th July 2011** and more specifically the

advocates cannot seek to obtain payment beyond that which was provided under the contract. Accordingly, the advocates were not entitled to draw the bill of costs. What the advocates should have done is to sue for the amount in the contract.

20. Was the client barred from raising the issue of jurisdiction to the taxed bill of costs?

21. In the case of Owners and masters of The Motor Vessels “Joey” vs. Owners and Masters of The Motor Tugs “Barbara” and “Steve B” [2008] 1 EA 367 the court of appeal expressed itself as follows:

“The question of jurisdiction is a threshold issue and must be determined by a Judge at the threshold stage, using such evidence as may be placed before him by the parties. It is reasonably plain that a question of jurisdiction ought to be raised at the earliest opportunity and the court seized of the matter is then obliged to decide the issue right away on the material before it. Jurisdiction is everything and without it, a court has no power to make one more step. Where a 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....as soon as that is done, the court should hear and dispose of that issue without further ado”.

22. Further whether a court of law of tribunal has jurisdiction to entertain a matter, it is crucial that it be raised at any time even at the stage of an appeal. This is what the court of appeal stated in the case of **Dubai Bank Kenya Limited v Kwanza Estates Limited [2015] eKLR** as follows:

“it would therefore have been prudent for the appellant to raise the question of jurisdiction before the superior court as that way this court would have had the benefit or reasoning of the superior court on the issue. However, we must now determine whether the issue of jurisdiction can be properly raised by the appellant at this stage. In Floriculture International Ltd v Central Kenya Ltd & 3 Others [1995] eKLR, the court held that the issue of jurisdiction can be argued at any time. The court remarked as follows:

“it has been held in the case of Kenidia Assurance Co. Ltd v Otiende [1989] 2KAR 162 that the normal rule that a party could not raise for the first time on appeal a point he had failed to raise in the High Court, did not, and could not apply when the issue sought to be raised de novo on appeal went to jurisdiction.”

The reasoning is that even where the question of jurisdiction is not raised that does not necessary confer jurisdiction on the court if it has none. Accordingly, we find that the appellants are not precluded from raising the jurisdictional issue for the first time on appeal having not raised it in the superior court.”

23. The fact that the issue of jurisdiction was not raised during the taxation before the taxing master, is no bar to it being raised subsequently, even during the hearing of a reference.

24. It is this court’s finding that the advocate/client bill of costs was wrongly filed and taxed before the taxing master in view of the existence of a contract between advocates and client. The taxing master therefore lacked jurisdiction to tax that bill of costs. In view of this finding, this court will not proceed to consider the various objections raised in respect of various items in the bill of costs.

25. The client, of course should have raised the issue of jurisdiction at the earliest possible moment. It did not. It waited until the hearing of this reference to raise that objection. For that reason, although the client has succeeded with the reference, it shall not be awarded costs of the reference,

26. In the end, this court finds and holds that the taxing master had no jurisdiction to tax the bill of costs. It follows that the ruling of the taxing master **S. A. Opande of 15th February, 2018** is hereby set aside. Further the bill of costs filed on **4th April, 2017**, is hereby struck out. There shall be no order as to costs.

DATED, SIGNED and DELIVERED at NAIROBI this 30th day of October, 2018.

MARY KASANGO

JUDGE

Ruling read and delivered in open court in the presence of:

Court Assistant.....Sophie

..... for the Applicant

..... for the Respondent

MARY KASANGO

JUDGE